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2 artificially controlled by the City of Tacoma ("Tacoma"), which utilizes the head for  
3 hydroelectric purposes. The lake is the source of the Skokomish River, which flows into the  
4 southern end of Hood Canal.

## 5 II

6 The hydroelectric project which controls the lake levels is currently up for licensing  
7 before the Federal Energy Regulatory Commission. Although Tacoma has the right to raise  
8 the level of the lake to an elevation of 742 feet, it is unlikely that it will approach that level in  
9 the near future. More probable is that the lake will not be raised over an elevation of 730 feet.

## 10 III

11 Darby has owned a home on the lake since 1969. He like all other shoreline owners,  
12 lease their land from Tacoma. The line of vegetation on his and the neighboring properties  
13 since June 1, 1971, has been slightly above the toe of the bank, and is evidenced by salal and  
14 fir.

## 15 IV

16 Historically, Tacoma raises the lake level in the summer months of June, July and  
17 August. Usually the lake starts coming up around June 1st, it reaches its zenith in July, and  
18 starts receding in August. In the past the lake level rose up so that boat moorage on the water  
19 from the typical dock was possible for about one month.

## 20 V

21 Darby built a dock in 1970. The dock consisted of a walkway at the top of the bluff  
22 leading to the water, a ramp and a rectangular structure, similar in size to the present  
23 octagonal structure, on top of pilings. That structure floated away in June 1971. At some  
24 time, he also built a foot bridge to a 40 foot square "island" which is about 120 feet beyond  
25 the line of vegetation.

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2 VI

3 Darby did not consider replacing the rectangular structure until 1990. The summer of  
4 that year was at the end of a two year period of draw down of the lake, due to construction of  
5 a spillway for the reservoir. In October, Darby contacted Don Brush, the County planner, and  
6 requested a permit packet for the construction of waterfront structures. When Darby received  
7 the packet, he did not act on it. In January 1991, he read an article in the Tacoma News  
8 Tribune, in which the National Parks Service announced that it would not allow the lake to rise  
9 to an elevation above 725 feet. Upon reading this article, he temporarily abandoned his plans  
10 to build the waterfront structures.

11 VII

12 In April 1991, Darby observed the lake rise one foot in one day. He forgot about the  
13 permit requirements and started building around the clock, hoping to have his construction  
14 completed in time to moor small boats at his structures. He and his neighbor completed  
15 overall, about 75 percent of the rebuild of the foot bridge, walkway, ramp; and construction of  
16 the new octagonal structure, fixed on new piling, over five weekends.

17 VIII

18 Mr. Brush arrived for an inspection on April 29, 1991. He inquired whether Darby  
19 was adding a deck below his house. Darby replied that previously he had a structure there.  
20 Mr. Brush asked whether Darby had photographs of the old structure. Darby replied: "No."  
21 Mr. Brush advised Darby that he needed to obtain a permit within five days.

22 IX

23 Darby received a letter from the County on May 6, 1991, informing him that the  
24 octagonal structure, which the County then regarded as a dock, appeared illegal. At this time  
25 the surface of the dock was about 33 percent complete, and one of 7 benches was built into the  
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1  
2 structure. Darby was asked to remove the dock, unless he could prove that it had existed  
3 before.

4 X

5 A week later, Darby telephoned Mr. Brush and asked how he could retain his dock.  
6 Mr. Brush suggested three alternatives: 1) prove that the structure existed before through  
7 photographs or affidavits of neighbors; 2) apply for a shoreline variance; or 3) apply for a  
8 community dock with three neighbors who were landlocked.

9 XI

10 In correspondence of November 1991, the County concluded and advised Darby that  
11 the octagonal dock was illegal and would have to be removed.

12 XII

13 Darby applied to the County for shoreline substantial development and variance permits  
14 in November 1991, for a 24 foot diameter octagon shaped dock with a 9 foot by 6 foot  
15 approach section. The octagonal structure is approximately 364 square feet in size. As  
16 originally constructed, it had a fire pit in the middle, and benches and railings around the  
17 perimeter. It is secured to the walkway with removable bolts. Cables and styrofoam were  
18 later added. Although the waters of the lake have risen to allow occasional moorage, and it  
19 has "floated" on two days since 1991, it has never floated free of the walkway. All of Darby's  
20 waterfront structures are built at an elevation of 740 feet. The lake has reached or exceeded an  
21 elevation of 738 feet on only four occasions since 1971: September 9 and 10, 1978, June 14,  
22 1986, and August 29 and 30, 1991. The maximum elevation recorded during this period was  
23 739 feet, on August 30, 1991.

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**XIII**

The Mason County Shoreline Advisory Board ("SAB") met on May 26, 1992, to consider Darby's request. The SAB concluded that the octagonal structure met the requirements of a "float," under the Mason County Shoreline Master Program ("MCSMP"); despite the staff's position to the contrary. The SAB noted that the shape of the structure was unique and "that the regulations do not really allow for such creativity".

**XIV**

Don Brush prepared a staff report to the Board of County Commissioners, dated June 23, 1992. He concluded that the octagonal structure was not a float. It required a variance from the eight foot maximum width allowed for recreational docks and piers. He recommended that the variance be denied because the applicant had not proven a true hardship.

**XV**

The County Commissioners considered the Darby application at two of its meetings: June 23 and June 30, 1992. They approved the substantial development and variance permits, with three conditions: 1) limiting the height of the railing to 30"; removing the 2 sections of the railing where boats can be moored; and removing the fire pit.

**XVI**

Ecology denied the variance permit on July 28, 1992. Ecology concluded that the octagonal structure was not a dock, but a deck, and that the applicant had not satisfied the criteria for obtaining a variance.

**XVII**

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

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## CONCLUSIONS OF LAW

### I

The Board has jurisdiction over the shoreline issues. RCW 90.58.180.

### II

The burden of proof is upon the party requesting review. WAC 461-08-170(9).

### III

No substantial development permit may be issued which is inconsistent with the provisions of the Shoreline Management Act ("SMA") and the local master program. RCW 90.58.140(2)(b).

### IV

Lake Cushman is a shoreline of state wide significance. RCW 90.58.030(2)(e)(iv); WAC 173-20-490(1).

### V

The definition of the ordinary high water mark is:

*that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect on June 1, 1971, as it may naturally change thereafter, or as it may change in accordance with permits issued by a local government or the department. . . (emphasis added.)*

RCW 90.58.030(2)(b); MCSMP, ch. 7.08, p. 9. The ordinary high water mark on Lake Cushman is slightly above the toe of the bank on the property Darby leases from Tacoma. There was no evidence presented that established a different level as of June 1, 1971. The lowering of the lake level by Tacoma, is not a natural change of the lake level, but rather an artificial, or man-made change. We conclude that the ordinary high water mark will

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2 remain at that level, unless and until it either changes naturally; or changes through the  
3 issuance of a shoreline permit or permits under the SMA.

#### 4 VI

5 The substantial development involved in this case, required a variance because the  
6 proposal was not consistent with the use regulations of the MCSMP.

#### 7 VII

8 The octagonal structure is not a float. The structure was described both in the  
9 application and the permit as a dock. A pier or dock is defined in the MCSMP as: "A  
10 structure built over or floating upon the water, used as a landing place for marine transport or  
11 for commercial or recreational purposes. Structures regulated by this section include piers and  
12 docks, floats, stairways, marine railways, mooring buoys and boat ramps. MCSMP, ch.  
13 7.16.170. A float is defined in Webster's Third New International Dictionary 871 (1971) as:  
14 "a platform that floats and is anchored at or near shore and used esp. for landing or the  
15 convenience of swimmers". The platform's use as a moorage for boats is indistinguishable  
16 from the use, for that purpose, of the current walkway. It is built above the normal elevations  
17 of the lake. It appears that it will remain considerably above the future elevations of the lake  
18 for an indefinite period. It has never floated free from the walkway. For all practical  
19 purposes, it is a permanent, fixed structure. The attempt to characterize it as a float was an  
20 afterthought.

#### 21 VIII

22 Darby and the County argue that their present determination that the octagonal structure  
23 is a float is bolstered by ch. 7.16.170, Use Regulation 15, which mandates that: "All floating  
24 structures shall include intermittent supports to keep structures off the tidelands at low tide"  
25 The argument begs the question. It assumes that the structure is a float, which it is not.

IX

We are furthermore not persuaded that it is a dock. It has rarely, in the past, been used as a landing place for boats. It is unlikely that it will be so used in the foreseeable future. The primary recreational purposes it serves, sitting in and enjoying the sun and the view, are the same purposes that could be served by a deck. A deck is considered an accessory structure to a residence, and governed by ch. 7.16.080 of the MCSMP. Over-water residential development is prohibited under the MCSMP, ch. 7.16.080, Use Regulation 1. Uses which are specifically prohibited by the master program, may not be authorized. WAC 173-14-140(3), 150(5). Parker and Mason County v Department of Ecology, SHB No. 82-41 (1983).

X

Even if the structure were considered a float or a dock, it would require a shoreline variance. If it is a float, it does not conform to the first portion of the following use regulation:

*At the end of a dock or pier, a float may be attached. These floats may either be parallel to the dock or pier, or form a "T" or "L". . . In fresh water, the float area shall not exceed 250 square feet without a boat slip (400 square feet for two joint use owners), or 400 square feet with a boat slip (700 square feet for two joint use owners)*

MCSMP, ch. 7.16.170, Use Regulation 10. The structure is not parallel to the existing walkway or ramp; nor is it in the shape of a T or an L.

XI

If the octagonal structure were considered a dock, it would exceed the minimum dock width of eight feet MCSMP, ch. 7.16.170, Use Regulation 9.



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## XII

Variances are designed as escape valves from imperfect land use ordinances. 3R. Anderson, American Law of Zoning 3d, sec. 19.10 (1986). This mechanism allows governmental entities to avoid application of a land use restriction, which literally applied would deny a property all beneficial use of the property. Id. at sec. 20.02.

## XIII

Variances are exceptions to the rule. The SMA is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 743 P.2d 265 (1987). Concomitantly, exceptions to its regulations must be strictly construed. See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d (1975)(holding that the liberal construction command of the Open Public Meetings Act implies an intent that the act's exceptions be narrowly confined).

## XIV

The County variance criteria, with one exception, are identical to those contained in Ecology's regulations at WAC 173-14-150. Under WAC 173-14-155, the Board applies the most restrictive criteria to the project Strand v. Snohomish County, SHB No. 85-4 (1985).

## XV

The MCSMP contains the following variance criteria:

The purpose of a Variance permit is strictly limited to granting relief to specific bulk, dimensional or performance standards set forth in the Master Program, where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the Master Program would impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020 (emphasis added).

1 Variance Permits for development that will be located landward of the ordinary high  
2 water mark (OHWM), except those areas designated as marshes, bogs, or swamps,  
3 may be authorized provided the applicant can demonstrate all of the following:

4 1. That the strict application of the bulk, dimensional or performance standards set  
5 forth in the Master Program precludes or significantly interferes with a reasonable use  
6 of the property not otherwise prohibited by the Master Program;

7 2. That the hardship which serves as a basis for the granting of the variance is  
8 specifically related to the property of the applicant, and is the result of unique  
9 conditions such as irregular lot shape, size, or natural features and the application of  
10 the Master Program, and not, for example from deed restrictions or the applicant's own  
11 actions;

12 3. That the design of the project will be compatible with other permitted activities  
13 in the area and will not cause adverse effects to adjacent properties or the shoreline  
14 environment;

15 4. That the variance authorized does not constitute a grant of special privilege not  
16 enjoyed by other properties in the area, and will be the minimum necessary to afford  
17 relief;

18 5. That the public interest will suffer no substantial detrimental effect.

19 Variance Permits for development that will be located either waterward of the ordinary  
20 high water mark, or within marshes, bogs, or swamps, may be authorized provided the  
21 applicant can demonstrate, in addition to Items 1-5 above, that:<sup>1</sup>

22 6. The public rights of navigation and use of the shorelines will not be adversely  
23 affected by the granting of the variance.

24 In the granting of all Variance Permits, consideration shall be given to the cumulative  
25 impact of additional requests for like actions in the area. For example, if variances  
26 were granted to other developments in the area where similar circumstances exist the  
27 total of the variances should also remain consistent with the policies of RCW 90.58.020  
and should not produce substantial adverse effects to the shoreline environment.

Requests for varying the use to which a shoreline area is to be put are not requests for  
variances, but rather requests for conditional uses.

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<sup>1</sup> Ecology's regulations are stricter, in regard to structures waterward of the ordinary high water mark, in that they require that the applicant show that denial of the variance will "preclude a reasonable use," thus eliminating the option of showing that the denial merely "significantly interferes with a reasonable use" To this extent, the Board applies Ecology's criterion, not that of the County.

1 MCSMP, ch. 7.28.020.

2 **XVI**

3 Darby has not demonstrated that denial of the variance would cause him an unnecessary  
4 hardship. An applicant must show extraordinary or unique circumstances, related to their  
5 property, in order to qualify under the statutory and regulatory threshold of unnecessary  
6 hardship. RCW 90.58.100(5); MCSMP, ch. 7.28.020. Darby has failed to show either. He,  
7 like his neighbors, is experiencing the lowering of Lake Cushman, from historic levels. As a  
8 result, many of the residents are experiencing less access to the lake. This is not a situation  
9 unique to Darby, but is one common to all those who live on the lake. It is not the nature of  
10 their property interest that is causing the problem; rather it is the external lowering of the lake  
11 by Tacoma, in response to its federal licensure process. Many neighbors have waterfront  
12 structures, designed for the moorage of boats, which are now essentially high and dry, and  
13 unable to serve a water dependent function.

14 **XVII**

15 Even if Darby were able to establish extraordinary circumstances, he has not proven  
16 that his project satisfies sections 1-5, as well as the cumulative impact criterion, in order to  
17 justify granting of the variance.

18 **XVIII**

19 Denial of the variance would not preclude Darby from a reasonable use of the property,  
20 which is not prohibited by the master program. The activities he can reasonably expect to  
21 obtain from the octagonal structure, could be accomplished on upland portions of the property.  
22 Indeed, as we earlier discussed, the MCSMP prohibits residential development waterward of  
23 the ordinary high water mark. The moorage of boats could occur on the walkway. Although  
24 that has a southern exposure, it is the same exposure that would occur on the lakeward portion  
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2 of the octagonal structure, where he currently has two moorage stations. As we observed  
3 earlier, however, it is unlikely that these structures will be usable for moorage, in the  
4 foreseeable future, due to the projected future lake levels. Therefore, the octagonal structure  
5 does not meet the criteria of the MCSMP, ch. 7.28.020(1).

## 6 XIX

7 As was discussed above, the alleged hardship is not specifically related to the property,  
8 but rather is a result of the actions of Tacoma. Darby alleges that the hardship is due to the  
9 steepness of the topography. Darby failed to prove that the primary uses to which this  
10 structure will reasonably be put, namely resting, viewing and sunbathing, cannot be  
11 accomplished on other portions of the property. The only present hardship that Darby suffers  
12 is self-induced; namely, he built the octagonal structure prior to obtaining the proper shoreline  
13 permits. The variance application for the octagonal structure does not satisfy the MCSMP,  
14 ch. 7.28.020(2).

## 15 XX

16 Darby was unable to prove that the octagonal structure is compatible with other uses  
17 permitted under the SMA, in the area. He did offer evidence of a nearby dock structure which  
18 had obtained a building permit from the County, which structure was exempt from the  
19 County's substantial development permit requirement. The structure was apparently not built  
20 according to the plans submitted to the County. There was no proof of County approval of the  
21 nonconformity. Moreover, one illegal use does not justify another. The octagonal structure  
22 does not satisfy the variance criterion of MCSMP, ch. 7.28.020(3).

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The octagonal structure, if approved, would constitute a grant of special privilege. It would be the only structure of its kind, approved under the MCSMP, on Lake Cushman. To approve it, under the circumstances, would be tantamount to amending the MCSMP. Equally important, the structure is not the minimum structure necessary to afford relief. Darby admitted that he could design a smaller structure. If boat moorage and swimming were what he really had in mind as the primary uses, there appears to be no prohibition against his designing a true float that would accommodate small boat moorage when the water is up. To place such a structure at the current location, however, would not accomplish that purpose because of the low lake level. Darby has failed to demonstrate that the structure is consistent with the requirement of MCSMP, ch. 7.28.020(4).

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The public interest would suffer by approval of the variance. Approval would reward Darby for the illegal conduct of constructing this substantial development without the proper shoreline permits. Approval would require stretching the variance criteria to meet a situation they were not designed to address. Many of the issues raised in this appeal, are issues that could face other lake residents. These issues stem from the lowering of the lake level. The County would be wise to address these issues, not through the case-by-case review of shoreline permit requests, but rather through a comprehensive review and amendment of the MCSMP provisions as they relate to waterfront access and recreation on Lake Cushman. No one relishes the thought of lengthy piers extending out from the ordinary high water mark out to a lowered lake. The beauty of the lake environment calls for a sensitive solution to this problem with active involvement from the entire community of interests. The County may want to consider promulgating a moratorium under the State Environmental Policy Act or the

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2 Shoreline Management Act, while it undertakes this comprehensive review of its master  
3 program.

4 **XXIII**

5 Darby has failed to prove that approval of the octagonal structure would satisfy the  
6 public interest criterion of MCSMP, ch. 7.28.020(5).

7 **XXIV**

8 We also conclude that the variance, if granted, would violate the cumulative impact  
9 criterion of the MCSMP. Approval would constitute a powerful precedent for the granting of  
10 shoreline variance permits for the construction of permanent structures below the ordinary high  
11 water mark, which structures do not serve primarily a water dependent use. This would be  
12 inconsistent with a basic principle of the SMA.

13 **XXV**

14 Denial of the variance renders the substantial development permit non-conforming to  
15 the MCSMP.

16 **XXVI**

17 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.  
18 From the foregoing, the Board issues this:

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2 **ORDER**

- 3 1. Ecology's denial of the shoreline variance is affirmed.  
4 2. The county's approval of the substantial development permit is reversed.  
5 3. Darby is ordered to remove the octagonal structure and attendant ramp.  
6 DONE this 6th day of April, 1994.

7  
8 **SHORELINES HEARINGS BOARD**

9   
ROBERT V. JENSEN, Presiding Officer

10   
11 RICHARD C. KELLEY, Member

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13 BOBBI KREBS-MCMULLEN, Member

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15 O'DEAN WILLIAMSON, Member  
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